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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1137

FOTOMAT CORPORATION,

Petitioner,

vs.

PHOTOVEST CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONER.

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SUBJECT INDEX

Page

Reply Brief of Petitioner 1

Conclusion 5

TABLE OF AUTHORITIES CITED

Case

Grolier, Inc. v. FTC, ... F.2d .... (9th Cir. 1980) .. 4

Rule

Federal Rules of Civil Procedure, Rule 5(a) 4

Miscellaneous

2 Moore's Federal Practice, Secs. 5.01[8]-[9], 5.02, pp. 131³-14 (2d ed. 1979) 4

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REPLY BRIEF OF PETITIONER.

The Petition for a Writ of Certiorari in this case has raised the issue of whether the practice of permitting the filing of in camera trial briefs undermines the integrity of the fact finding process. Respondent has acknowledged the significance of this issue, even characterizing as "well settled" the fact that trial briefs are frequently not subject to service under the rules and/or practice of many federal courts (Opp. at 4, 14). Respondent has also acknowledged the impact of such briefs, admitting Fotomat's observation (Pet. at 3) that the lengthy brief accepted by the trial court was specifically intended to be withheld from opposing counsel (Opp. at 5).

Respondent's opposition rests on several factual allegations which, seen in proper context, are not correct;

which are essentially irrelevant to the blanket rule proposed for adoption by petitioner; and which, to the extent they are pertinent at all, serve only to highlight the need for such a rule prohibiting ex parte communications to the trier of fact.

1. Respondent has observed, no less than six times (Opp. at 2, 6, 8, 9, 10, 11), that there was but a short delay of nine days between the filing of its in camera brief and its service upon Fotomat counsel. All but ignored is the fact that between the ninth and tenth day of trial there was a two month recess. During this time, Fotomat still did not have the full Photovest trial brief. Only after Fotomat raised the issue before the trial court for the third time and asked for a mistrial and recusal of the trial judge—which motion was denied—did Photovest decide to serve its brief (XI Tr. 1715-1716, 1726).

2. Respondent urges that Fotomat was somehow guilty of calculated delay because no objection was voiced to the secret Photovest trial brief until "the eve of trial" (Opp. at 12-13). Yet the bottom line is that the challenge to the practice was made in good faith immediately upon learning that the ex parte filing had occurred. The Court of Appeals itself concluded that "[n]othing in the record suggests any foul play or attempts to secure an unfair advantage by either party" (App. A at 5a).

Moreover, one wonders just why it "was too late to object" (Opp. at 13) on the day that the ex parte filing occurred. At that time, the trial court could easily have returned the Photovest trial brief unread. By that simple remedy, the taint upon its subsequent findings could have been prevented.

3. Respondent also tries to pillory Fotomat because it "promptly submitted" an in camera "brief" of its own on being denied "immediate access" to Photovest's secret brief (Opp. at 6). That characterization is inaccurate.[1]

4. Finally, respondent urges that there has been no showing of how Fotomat would have acted differently if it had been timely served with the trial brief (Opp. at 10). To the contrary, Fotomat would obviously have responded to Photovest's concealed advocacy. More importantly, had a rule establishing the need for service existed, the response to the full Photovest brief would have been made to a trier of fact who was necessarily cognizant of the need to examine both views of the case before accepting "all the

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[1]Fotomat first complained to the trial court the Friday before trial was to convene, only to be told that the parties would be left "where they find themselves" (App. A at 3a). Fotomat sought reconsideration of this decision on the first day of trial. The trial court then ordered Photovest to serve only an abridged version of its brief (App. A at 3a). Fotomat then asked if the unserved portion might be returned to Photovest by the court so that there would be no ex parte material involved in its decision making. This was refused (II Tr. 214-215).

Only at this point did Fotomat—in response to a ruling which it considered unfair but which was obviously going to constitute the ground rule of that trial—ask to file a paper with the trial court alone (II Tr. 215). This so called "brief" was but a five page paper discussing one of Photovest's witnesses, and was given to Photovest's counsel during the two month recess. Respondent did not then "voluntarily" turn over its complete brief on receipt of Fotomat's five page paper as described in the Opposition (Opp. at 13-14). The full Photovest brief was served only after the recess when Fotomat unsuccessfully moved for a mistrial and recusal of the trial judge, and this belated service was quite possibly in response to the trial court's own expression of doubt as to the propriety of what had occurred (XI Tr. 1725-26).

help I can get that helps me get ready for correct rulings" (II Tr. 215).

In sum, respondent's attempted factual dissection of the record serves only to affirm the necessity of a clearly articulated rule barring unilateral advocacy of any type in any context.[2] In the absence of a dispositive rule to guide courts and litigants, an unsuccessful party whose case has been subject to secret communications with the trier of fact must inevitably question whether a subsequent adverse decision was truly the result of an unbiased resolution of the issues at hand. The successful litigant, on the other hand, can only respond with the equally unprovable claim that no prejudice has accrued.

This kind of debate hardly serves to instill confidence in the integrity of the judicial process. A rule mandating the contemporaneous service of all matters filed with a court[3]—which a fair reading of Rule 5(a) would appear to require anyway—would go far to restore and preserve the trust that courts, like other governmental institutions, so sorely need.

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[2]Such an absolute rule has recently been adopted by the Ninth Circuit in the even less restrictive context of administrative proceedings. *Grolier, Inc. v. FTC*, ... F.2d .... (9th Cir. 1980). In that decision, the Court of Appeals held that an administrative law judge was presumptively barred from presiding over a case if he had received any information on the case, or on a related matter, when working as an advisor to a commissioner, even though the judge no longer recalled that he had ever had any contact with the case in question.

[3]Respondent's intimation (Opp. at 15) that the 1970 amendment to Rule 5(a) manifested an intent to leave ungoverned ex parte documents not specifically mentioned is misplaced. All that that amendment did was to require service, on an otherwise uninvolved party, of papers already required to be served on a party intended to be affected by those papers. See 2 MOORE'S FEDERAL PRACTICE §§ 5.01[8]-[9], 5.02, at 1313-14 (2d ed. 1979). Quite obviously, then, the import of the amendment is to emphasize even more strongly that Rule 5(a) is intended to ensure that *every* party sees *everything* that is filed.

Conclusion.

For the reasons stated above and in the Petition for a Writ of Certiorari, a writ of certiorari should be granted and a new trial ordered.

Respectfully submitted,

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